

STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART

*In the Matter of Reexamination of the Comparative Standards for
Noncommercial Educational Applicants -- MM Docket No. 95-31*

We would have found that Section 309(j)(2)(C) of the Communications Act precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are obligated to give it effect.⁸⁷

The specific exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits its reach to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in Section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station.⁸⁸ To the contrary, our rules specifically address the situation in which noncommercial educational stations are licensed to operate on unreserved channels.⁸⁹

Had Congress intended to limit the exemption for noncommercial educational and public

⁸⁷ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁸⁸ See 47 C.F.R. § 73.503.

⁸⁹ See 47 C.F.R. § 73.513.

broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, we believe that Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage.⁹⁰ Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended.⁹¹ We would not read this limitation back into the statute.

The majority's reasoning to the contrary is unpersuasive. Although the majority tries to paint itself as caught between two "conflicting statutory directives," para. 106 (juxtaposing sections 309(j)(1) & (j)(3)(C) with section 309(j)(2)(C)), this characterization of section 309 is just not tenable. The statutory language is not in equilibrium, leaving the Commission free to choose one side or the other, but clearly weighs in favor of exempting NCEs from auctions across the board.

The directive in section 309(j)(1) to auction all mutually exclusive applications, on which the majority places such reliance, is by its clear terms subject to the exemptions set forth in the very next subsection. That subsection, of course, includes the exemption for noncommercial stations. See 309(j)(1) ("If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, *except as provided in paragraph (2)*, the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding. . . ."). Section 309(j)(1) is simply not an order to auction all mutually exclusive applications, as the majority suggests, and cannot be relied upon as such. Furthermore, the directive in section 309(3)(C) is simply to "seek to promote" – not to accomplish at all costs, and surely not where inconsistent with the actual statutory scheme – recovery of the value of spectrum made available for commercial use.

On the other side of the scale, there is section 309(j)(2)(C), which follows immediately the mandate to auction mutually exclusive applications except in certain situations. It provides that one of those situations is where "licenses or construction permits [are] issued by the Commission for stations described in section 397(6) of the Act." This exemption speaks *specifically* to the question of how to treat NCE applicants in a mutually-exclusive application situation. Accordingly, under the canon of construction that the specific governs the general, *see, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), we think it should trump whatever directives one might find in sections 309(j)(1) and (2)(C). As explained above, however, section 309(j)(1) is not an absolute mandate to auction all commercial spectrum and the hortatory "seek to promote" language of section (j)(C)(3) must give way to the mandatory language of the statutory exemption for NCEs.

⁹⁰ See H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1).

⁹¹ See *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

*In the Matter of Reexamination of the Comparative Standards for
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While I generally support the point system adopted in the Order, I would have given an additional boost to stations that promised to provide a minimum level of locally-originated programming. Local-origination programming is one of the foundations on which the noncommercial educational service was built. As the Order notes, the 1967 Carnegie Report, which Congress relied upon to develop and improve noncommercial educational television stations, provided that:

The heart of the system is to be the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.⁹²

Congress and the Supreme Court have repeatedly endorsed the preservation of local-origination programming as a legitimate and substantial governmental interest. In its official findings underlying the 1992 Cable Act, Congress stated: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation."⁹³ In *Turner*, the Supreme Court expressly cited this finding in rejecting the argument that Congress' "legitimate legislative goals" would be satisfied by the preservation of a truncated broadcasting industry providing a minimum level of service.⁹⁴ Similarly, in *Midwest Video*, the Court upheld an FCC requirement that cable operators make facilities available for local programming production as reasonably furthering the goal of "increasing the number of outlets for community self-expression."⁹⁵

In the Community Broadcasters Protection Act of 1999 ("CPBA"), Congress recently reaffirmed the value it places on local-origination programming. In the CPBA, Congress provided additional "Class A" protection to certain low-power television stations who have "operated their stations in a manner beneficial to the public good." One of the primary qualifications for Class A status is that the station must broadcast at least 3 hours a week of locally-produced programming. Similarly, in the Commission's recent Order on low power radio, it gave additional points to applicants who would air at least eight hours a day of local-origination programming.

⁹² Carnegie Commission on Educational Television, *Public Television: A Program For Action* 87 (1967).

⁹³ *Cable Television Consumer Protection and Competition Act of 1992*, 102 P.L. 385 (1992) Sec. 2(a)(10).

⁹⁴ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). See also *Chicago Cable Communications, et al. v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989).

⁹⁵ *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972). See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 203 (1943) ("A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.").

The majority argues that the examples of Class A LPTV and LPFM are inapposite because they involve services that are highly localized, unlike full-service NCE stations that have broader goals and a wider signal range. In adopting the LPFM local program origination rule, however, the Commission expressly stated that “[t]his criterion derives from the service requirements *for full-service broadcast stations*, which are required to maintain the capacity to originate programming from their main studios.”⁹⁶ Thus, awarding additional credit for local-origination was *not* based on the localized nature of the service, as the majority now asserts, but on the obligation of full-power stations to maintain the ability to produce local programming.

In sum, awarding additional points for local-origination programming would: (1) promote the purpose of the noncommercial educational service; (2) advance Congress’ goal of preserving local origination programming; and (3) pass muster in court. The majority’s argument against adoption is specious. I therefore dissent.

⁹⁶ *Report and Order*, MM Docket 99-25, para. 144 (rel. January 27, 2000) (emphasis added).

Appendix A: Summary of NCE Selection Procedures**Preliminary Determinations:**

A. For Translators Only: Does any proposal provide fill-in service (within the primary station's protected contour)? If yes, dismiss non-fill-in applications. If a mutually exclusive (fill-in or non-fill) group remains, proceed directly to point system.

B. THRESHOLD 307(b) ISSUE (Full service radio only): If the mutually exclusive proposals would serve different communities does one service area need an NCE station radio significantly more than the other, e.g. would one applicant provide first or second NCE aural service to a significantly larger population? If yes, grant that proposal. If not proceed to point system.

Point System:**1. Local Diversity (2 points):**

Principal community contour of proposed station does not overlap the principal community contour of any attributable station (comparing radio to radio and television to television, and based on attributable interests of entity and parent, and their directors and members of their governing boards at time of filing).

2. State-Wide Network (2 points, but only to applicants not claiming a local diversity credit):

Applicant does not qualify for local diversity points but provides services within a single state to a minimum of 50 accredited elementary and/or secondary schools or 5 full-time campuses of an accredited college or university, under applicant's authority or in coordination with such authority, in furtherance of the curriculum.

3 Technical Parameters (1 to 2 points): One point is awarded to top applicant if, as of close of the filing window, it covers the largest area and population, and this differs by at least 10% from the proposal of the applicant with the second best technical proposal, as of that same time. Two points are awarded to the top applicant for a difference of 25% from the second best technical proposal.

4. Established Local Entity (3 points): Those physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the community for at least two years would be local. Governments would be local throughout the area within which their authority extends.

Tie Breakers: (Settlement permitted at any time)

(A) Primary Tie breaker: Fewest Existing Stations. If the case does not settle, award the permit to the tied applicant who had the fewest existing same service (FM or TV) authorizations (licenses and permits) at the time of filing;

(B) Secondary Tie breaker: Fewest Pending Applications. If any applicants are still tied, award the permit to the applicant with fewest pending applications at the time of filing;

(C) Tie Breaker of Last Resort.

Full Service Stations: Mandatory Time Sharing. If a tie nevertheless remains award the tied applicants an equal opportunity to operate on a part-time basis.

FM Translator Stations: First To File.

APPENDIX B
List of Commenters

Alaska Public Telecommunications, Inc., et al.
American Family Association
Americans for Radio Diversity
Augusta Radio Fellowship Institute, Inc.
Big Sky Broadcasting Company
Michael Black
Boston University, et al.
CSN International
Cedarville College
Center for Media Education, et al.
Colorado Christian University
Community Television, Inc.
Cornerstone Community Radio, Inc.
DeLaHunt Broadcasting
Educational Communications of Colorado Springs, Inc.
Educational Information Corporation
Educational Media Foundation
Elgin FM Limited Partnership
Faith Broadcasting, Inc.
Francis Marion University
Jack I. Gartner
Houston Christian Broadcasters, Inc.
Dale Jackson
Penny Jackson
Jimmy Swaggart Ministries
KBPS Public Radio Foundation
KDNK Board of Directors
Kaleidoscope Foundation, Inc.
Lakefront Communications, Inc.
Laredo Community College
Maranatha, Inc.
Minnesota Public Radio
Mohave Community College
Moody Bible Institute of Chicago
National Association of Broadcasters
National Federation of Community Broadcasters
National Public Radio, Inc., Association of America's Public Television Stations, and Corporation for
Public Broadcasting
National Religious Broadcasters
New Life Evangelistic Center, Inc.
New Mexico Commission on Public Broadcasting
Pensacola Christian College
Manuel F.V. Pereira

Pinebrook Foundation, Inc.
Public Radio for the Front Range
Real Life Educational Foundation of Baton Rouge, Inc.
Residents of Ponce, NE
Roaring Fork Public Radio Translator, Inc.
State of Oregon
Sacred Heart University, et al.
St. Gabriel Communications, Ltd.
Sister Sherry Lynn Foundation, Inc.
Sound of Life, Inc., et al.
Station Resource Group
Student Educational Broadcasting
James J. Stephens, Jr.
Taylor University Broadcasting, Inc.
University of Arizona, et al.
University of California
WAY-FM, Inc., et al.
Robert T. Wertime
West Coast Public Radio, et al.
Western Baptist College

APPENDIX C
Final Regulatory Flexibility Analysis

Report and Order
MM Docket No. 95-31

As required by the Regulatory Flexibility Act ("RFA"),⁹⁷ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the Further Notice of Proposed Rulemaking for the docket in this proceeding.⁹⁸ The Commission sought written public comments on the proposals set forth in the Notice, including comment on the IRFA. The Commission's Final Regulatory Flexibility Analysis ("FRFA")⁹⁹ in this Report and Order ("Order") conforms to the RFA.¹⁰⁰

A. Need For and Objectives of the Rule: The Commission previously determined that traditional hearings, the method used to select among competing applicants for new noncommercial educational broadcast construction permits, were time consuming and burdensome, and that the criteria used in those hearings were vague and difficult to apply. This Order amends the Commission's rules to establish a simpler, clearer, and more streamlined process for selecting among competing noncommercial educational applicants. Specifically, it 1) establishes a point system, a type of simplified paper hearing on channels reserved for NCE use; 2) clarifies that auctions will apply on non-reserved broadcast channels; and 3) provides additional circumstances in which an NCE entity can have a non-reserved channel allocated as reserved.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA: No comments were received specifically in response to the IRFA in MM Docket No. 95-31. However, one commenter, in expressing support for the use of lotteries, an option not selected, stated that it thought lotteries would have a positive effect on small businesses.¹⁰¹

C. Description and Estimate of the Number of Small Entities to which Rules will Apply: Under the RFA, small entities may include small organizations, small businesses, and small governmental

⁹⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104- 121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

⁹⁸ Further Notice of Proposed Rule Making, In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) (Further Notice).

⁹⁹ This FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

¹⁰⁰ See 5 U.S.C. § 604.

¹⁰¹ See Comments of Pensacola Christian College at 12.

jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term that are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."¹⁰² We received no comment in response to either IRFA on how to define radio and television broadcast "small businesses." Therefore, we will continue to utilize SBA's definitions for the purpose of this FRFA.

The rules adopted in this Order will apply to television and radio stations licensed to operate on channels reserved as "noncommercial educational." With respect to television stations, the Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Television stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are other establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

For 1992 the total number of television stations that produced less than \$10.0 million in revenue was 1,155 of the 1,509 television stations then operating, both commercial and noncommercial, or 77 percent. As of July 31, 1999, of the 1,599 total television stations, 370 are noncommercial educational. Thus, we estimate that the proposed rules will potentially affect 285 (77 percent of 370) noncommercial educational television stations that are small businesses. These existing stations would only be affected if they file an application for major modification of their existing facilities, and if another applicant files a mutually exclusive application. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. On the other hand they may understate the number of small entities, because we believe that a larger percentage of noncommercial educational stations are small businesses than the percentage applicable to the television industry as a whole. We recognize that the proposed rules may also affect minority and

¹⁰² While we believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this FRFA, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to these rules and to consider further the issue of the number of small entities that are radio and television broadcasters or small media entities in the future. See Report and Order in MM Docket No. 93-48 (Children's Television Programming), 11 FCC Rcd 10660, 10737-38 (1996), citing 5 U.S.C. § 601(3).

women owned stations, some of which may be small entities. In 1997, minorities owned and controlled 38 (3.2%) of 1,193 commercial television stations in the United States. Comparable figures are not available for noncommercial stations. According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and noncommercial television stations in the United States. The proposal would also affect pending and future mutually exclusive applications for noncommercial television stations. As of August 1999, there are currently 67 pending applications for 22 channels reserved for noncommercial educational television usage.

The rule changes would also affect noncommercial educational radio stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Radio stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are entities which primarily are engaged in radio broadcasting and which produce radio program materials. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. The 1992 Census indicates that 96 percent of radio station establishments produced less than \$5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of July 31, 1999, official Commission records indicate that 12,582 radio stations are currently operating. Of the current radio station total, 2,055 stations are noncommercial educational. Thus, we estimate that 1,923 (96%) of these noncommercial educational stations are small businesses, possibly more because we believe that a greater percentage of noncommercial educational stations are small businesses than of the radio industry overall. These existing stations would only be affected by the proposal if they choose to file applications for major modification of facilities and if their applications are mutually exclusive with the application of another noncommercial entity. Applicants for new NCE radio stations would also potentially be affected. As of August 1999 there were 371 pending mutually exclusive groups of 1,102 applications, for new noncommercial FM radio stations. We also note that this proposal will affect future applications. With respect to minority ownership of radio stations, no information is available for noncommercial stations, but it is available for commercial stations. In 1997, minorities owned 284 (2.8%) of 10,282 commercial radio stations.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements: The measures adopted in the Order are anticipated to reduce the overall administrative burden of the Commission's application processes on applicants and the Commission. Use of a point system will eliminate the expense of preparing for and appearing at lengthy traditional hearings. Applicants should also receive decisions faster, because the Commission will make numerical calculations instead of preparing detailed hearing decisions. These savings should more than offset the time that would be required for applicants to gather and submit documentation supporting the points claimed. No additional professional services are required by applicants filing under these revised rules. Further, the cost of compliance will not vary between large and small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: This Order sets forth the Commission's new streamlined procedures for selecting among competing noncommercial educational applicants. All significant alternatives presented in the comments were considered. Small entities participating in auctions for non-

reserved channels may be eligible for a new entrant auction credit. Small entities may be eligible for points in the point system based on diversity of ownership, established local entity, and in a tie breaker for number of existing authorizations and applications.

F. Report to Congress The Commission will send a copy of the Reexamination of the Comparative Standards for Noncommercial Educational Applicants, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order, including this FRFA, (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

G. Further, the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

**APPENDIX D
Revised Rules**

Parts 73 and 74 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read:
Authority: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.202 is amended by revising paragraph a(1) to read as follows:

§ 73.202 Table of Allotments.

(a) ***

- (1) Channels designated with an asterisk may be used only by noncommercial educational broadcast stations. The rules governing the use of those channels are contained in Part 73, Subpart C. An entity that would be eligible to operate a noncommercial educational broadcast station can, in conjunction with an initial petition for rulemaking filed pursuant to Part 1, Subpart C of the Commission's rules, request that a nonreserved FM channel (channels 221 through 300) be allotted as reserved only for noncommercial educational broadcasting by demonstrating the following: (i) no reserved channel can be used without causing prohibited interference to TV channel 6 stations or foreign broadcast stations; or (ii) the applicant is technically precluded from using the reserved band by existing stations or previously filed applications and the proposed station would provide a first or second noncommercial educational radio service to 2,000 or more people who constitute 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour.

3. Section 73.502 is deleted and reserved for future use.

4. Section 73.503 is amended by adding a new paragraph (e) to read as follows:

§ 73.503 Licensing requirements and service

(e) mutually exclusive applications for noncommercial educational radio stations operating on reserved channels will be resolved pursuant to the point system in Subpart K.

5. Section 73.513 is amended by designating the existing language as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 73.513 Noncommercial educational FM stations operating on unreserved channels.

(a) Noncommercial educational FM stations other than Class D (secondary) which operate on Channels 221 through 300 but which comply with § 73.503 as to licensing requirements and the nature of service rendered, must comply with the provisions of the following sections of subpart B: §§ 73.201 through 73.213 (Classification of FM Broadcast Stations and Allocations of Frequencies) and such other sections of subpart B as are made specially applicable by the provisions of this subpart C. Stations in Alaska authorized before August 11, 1982, using Channels 261 through 300 need not meet the minimum effective radiated power requirement specified in §73.211(a). In all other respects, stations operating on Channels 221 through 300 are to be governed by the provisions of this subpart and not subpart B.

(b) When a noncommercial educational applicant is among mutually exclusive applications for an unreserved FM channel, the mutually exclusive applications will be considered pursuant to Subpart I - Competitive Bidding Procedures and not Subpart K - Application and Selection Procedures On Reserved Noncommercial Educational Channels.

6. Section 73.621 is amended by adding a new paragraph (h) to read as follows:

§ 73.621 Noncommercial educational TV stations.

(h) mutually exclusive applications for noncommercial educational TV stations operating on reserved channels shall be resolved pursuant to the point system in Subpart K.

7. Section 73.622 is amended by adding new language immediately preceding the last sentence of paragraph (a) to read as follows:

§ 73.622 Digital television table of allotments.

(a) *** Rules governing noncommercial educational TV stations are contained in §73.621. Where there is only one technically available channel available in a community, an entity that would be eligible to operate a noncommercial educational broadcast station may, prior to application, initiate a rulemaking proceeding requesting that an unoccupied or new channel in the community be changed or added as reserved only for noncommercial educational broadcasting upon demonstrating that the noncommercial educational proponent would provide a first or second noncommercial educational TV service to 2,000 or more people who constitute 10% of the population within the proposed allocation's noise limited contour. Stations operating on DTV allotments designated with a "c" are required to comply with paragraph (g) of this section.

8. Section 73.1150 is amended by adding a new paragraph (d) to read as follows:

§ 73.1150 Transferring a station

(d) Authorizations awarded pursuant to the noncommercial educational point system in Subpart K are subject to the holding period in Section 73.7005. Applications for an assignment or transfer filed prior to the end of the holding period must demonstrate the factors enumerated therein.

9. Section 73.3522 is amended to revise paragraph (b) to read as follows:

§ 73.3522 Amendment of applications

(b) *Reserved Channel FM and reserved noncommercial educational television stations—* Applications may be amended after Public Notice announcing a period for filing amendments. Amendments, when applicable, are subject to the provisions of Sections 73.3514, 73.3525, 73.3572, 73.3573, 73.3580, and Section 1.65. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration. Amendments will be accepted as described below and otherwise will only be considered upon a showing of good cause for late filing or pursuant to Section 1.65 or Section 73.3514:

(i) Section 73.7002 Selectee. A Public Notice will announce that the application of a Section 73.7002 Selectee (selected based on fair distribution) has been found acceptable for filing. If any Selectee's application is determined unacceptable the application will be returned and the Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must not alter the Section 73.7002 preference.

(ii) Section 73.7003 Tentative Selectee. A Public Notice will announce that the application of a Section 73.7003 Tentative Selectee (selected through a point system) has been found acceptable for filing. If any Tentative Selectee's application is determined unacceptable the application will be returned and the Tentative Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must claim the same number of qualitative points as originally claimed, or more points than claimed by the applicant with the next highest point total.

(iii) A Public Notice will identify all other reserved channel applications, such as non-mutually exclusive applications and the sole remaining application after a settlement among mutually exclusive applications. If any such application is determined unacceptable the application will be returned and the applicant will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor.

10. Section 73.3527 is amended by revising the first sentence of paragraph (e)(2) to read as follows:

§ 73.3527 Local public inspection file of noncommercial educational stations.

(e)* * *

(2) *Applications and related materials.* A copy of any application tendered for filing with the FCC, together with all related material, including supporting documentation of any points claimed in the application pursuant to Section 73.7003, and copies of FCC decisions pertaining thereto. ***

11. Section 73.3555 is amended by revising paragraph (f) to read as follows:

§ 73.3555 Multiple ownership.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section are relevant to evaluation of mutually exclusive noncommercial educational FM and TV applicants pursuant to Subpart K.

12. Section 73.3572 is amended by revising paragraph (d) to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, TV translator and TV booster station applications.

(d) (1) The FCC will specify by Public Notice, a period for filing applications for new television stations on reserved noncommercial educational channels or for major modifications in the facilities of an authorized station on reserved channels. TV reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely. Mutually exclusive applications for reserved channel television stations will be resolved using the point system in Subpart K.

(2) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with Section 73.3527(e)(2), supporting

documentation of points claimed, as described in the application form.

13. Section 73.3573 is amended by revising paragraphs (d), and (e) to read as follows:

§ 73.3573 Processing FM broadcast station applications.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed. In the case of mutually exclusive applications for reserved channels, the procedures in Subpart K will be followed. In the case of mutually exclusive applications for unreserved channels, the procedures in Subpart I will be followed.

(e) Processing reserved channel FM broadcast station applications

(1) Applications for minor modifications for reserved channel FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and will be processed on a "first come/first served" basis, with the first acceptable application cutting off the filing rights of subsequent, competing applicants. The FCC will periodically release a Public Notice listing those applications accepted for filing. Conflicting applications received on the same day will be treated as simultaneously filed and mutually exclusive. Conflicting applications received after the filing of the first acceptable application will be grouped, according to filing date, behind the lead application in the queue. The priority rights of the lead applicant, against all other applicants, are determined by the date of filing, but the filing date for subsequent conflicting applicants only reserves a place in the queue. The right of an applicant in a queue ripens only upon a final determination that the lead applicant is unacceptable and that the queue member is reached and found acceptable. The queue will remain behind the lead applicant until the construction permit is finally granted, at which time the queue dissolves.

(2) The FCC will specify by Public Notice a period for filing reserved channel FM applications for a new station or for major modifications in the facilities of an authorized station. FM reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(3) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with Section 73.3527(e)(2), supporting documentation of points claimed, as described in the application form.

(4) Timely filed applications for new facilities or for major modifications for reserved FM channels will be processed pursuant to the procedures set forth in Subpart K (Section 73.7000 et seq.)

Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications selected pursuant to the fair distribution procedures set forth in Section 73.7002; applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in Section 73.7003; and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of Section 73.3584 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the application, it will be granted. If an application is determined unacceptable for filing, the application will be returned, and subject to the amendment requirements of Section 73.3522.

14. Section 73.3584 is amended by adding a new first and second sentence to paragraph (a) to read as follows:

§ 73.3584 Procedure for filing petitions to deny

(a) For mutually exclusive applications subject to selection by competitive bidding (non-reserved channels) or fair distribution/point system (reserved channels), petitions to deny may be filed only against the winning bidders or tentative selectee(s), and such petitions will be governed by Sections 73.5006 and 73.7004, respectively. For all other applications the following rules will govern. ***

15. Section 73.3593 is amended by adding a new last sentence to read as follows:

§ 73.3593 Designation for hearing.

If the FCC is unable, in the case of any application for an instrument of authorization, to make the findings specified in § 73.3591(a), it will formally designate the application for hearing on the grounds or reasons then obtaining and will forthwith notify the applicant and all known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. If, however, the issue to be resolved is limited to the mutual exclusivity of applications for initial authorizations or for major changes to existing stations, that mutual exclusivity shall be resolved pursuant to competitive bidding procedures identified in Subpart I (unreserved channels) or point system procedures identified in Subpart K (reserved channels).

16. Part 73 is amended by adding a new Subpart K to read as follows:

Subpart K - Application and Selection Procedures On Reserved Noncommercial Educational Channels

Source: [Federal Register Publication of Report and Order in MM Docket 95-31, unless otherwise noted].

§ 73.7000 Definition of Terms (as Used in Subpart K only)

Attributable Interest: An interest of an applicant, its parent, subsidiaries, their officers, and members of their governing boards that would be cognizable under the standards in the notes to Section 73.3555. Also an interest of an entity providing more than 33 percent of an applicant's equity and/or debt that also either (1) supplies more than 15% of the station's weekly programming, or (2) has an attributable interest pursuant to Section 73.3555 in media in the same market.

Local Applicant: an applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served.

Established Local Applicant: an applicant that has, for at least the two years (24 months) immediately preceding application, met the definition of local applicant.

Nonreserved (Unreserved) Channels: Channels which are not reserved exclusively for noncommercial educational use, and for which commercial entities could thus be eligible to operate full power stations. Such channels appear without an asterisk designation in the FM Table of Allotments (Section 73.202) and TV Table of Allotments (Section 73.606)). In the event of a request to allocate a nonreserved channel as reserved pursuant to Sections 73.202(a) or 73.606(a), the channel remains classified as nonreserved until release of a Commission decision granting such request.

On-Air Operations: Broadcast of program material to the public pursuant to Commission authority, generally beginning with program test authority, for periods of time that meet any required minimum operating schedule, e.g. Section 73.561(a).

Population: the number of people calculated using the most recent census block data provided by the United States Census Bureau.

Reserved Channels: Channels reserved exclusively for noncommercial educational use, whether by the portion of the spectrum in which they are located (i.e. FM channels 200 to 220) or by a case-by-case Commission allotment decision (channels that appear with an asterisk designation in the FM Table of Allotments (Section 73.202) or TV Table of Allotments (Section 73.606)).

§ 73.7001 Services subject to evaluation by point system.

(a) A point system will be used to evaluate mutually exclusive applications for new radio, television, and FM translator facilities, and for major changes to existing facilities, on reserved channels.

(b) Mutually exclusive applications for nonreserved broadcast channels are not subject to a point system, even if one or more of the applicants would be eligible to and intends to operate in a noncommercial educational manner. Mutually exclusive applications for nonreserved broadcast channels will be resolved by the competitive bidding procedures in Subpart I regardless of the noncommercial or commercial nature of the applicants.

§ 73.7002 Fair distribution of service on reserved band FM channels.

(a) If timely filed applications for full service stations on reserved FM channels are determined to be mutually exclusive, and will serve different communities, the Commission will first determine, as a threshold issue, whether grant of a particular application would substantially further the fair distribution of service goals enunciated in Section 307(b) of the Communications Act, 47 U.S.C. § 307(b).

(b) An applicant for a full service FM radio station that will provide the first or second noncommercial educational (NCE) aural signal to at least 10% of the population within the 60 dBu (1mV/m) service contours of a noncommercial educational FM station substantially furthers fair service goals and will be considered superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of new service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. Otherwise, the mutually exclusive applications will proceed to examination under a point system.

(c) For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based.

§ 73.7003 Point system selection procedures.

(a) If timely filed applications for reserved FM channels or reserved TV channels are determined to be mutually exclusive, applications will be processed and assessed points to determine the tentative selectee for the particular channels. The tentative selectee will be the applicant with the highest point total under the procedure set forth in this section, and will be awarded the requested permit if the Commission determines that an award will serve the public interest, convenience, and necessity.

(b) Based on information provided in each application, each applicant will be awarded a predetermined number of points under the criteria listed:

(1) Established Local Applicant. Three points for local applicants as defined in Section 73.7000 who have been local continuously for no fewer than the two years (24 months) immediately prior to application, if the applicant's own governing documents (e.g. by-laws, constitution, or their equivalent) require that such localism be maintained.

(2) Local Diversity of Ownership. Two points for applicants with no attributable interests as defined in Section 73.7000, in any other broadcast station or authorized construction permit (comparing radio to radio and television to television) whose principal community (city grade) contour overlaps that of the proposed station, if the applicant's own governing

documents (e.g. by-laws, constitution, or their equivalent) require that such diversity be maintained. The principal community (city grade) contour is the 5 mV/m for AM stations, the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c), and the contour identified in 73.685(a) for TV.

- (3) State-Wide Network. Two points for an applicant that does not qualify for the credit for local diversity of ownership, if it is:
- (a) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state, encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of the school curriculum and the proposed station will increase the number of schools it will regularly serve; or
 - (b) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the number of campuses it will regularly serve; or
 - (c) an organization, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity described in (a) or (b) above for use in the school curriculum.

No entity may claim both the diversity credit and the state-wide network credit in any particular application.

- (4) Technical Parameters. One point to the applicant covering the largest geographic area and population with its relevant contour (60 dBu for FM and Grade B for TV), provided that the applicant covers both a ten percent greater area and a ten percent greater population than the applicant with the next best technical proposal. The top applicant will receive two points instead of one point if its technical proposal covers both a 25 percent greater area and 25 percent greater population than the next best technical proposal.)
- (c) If the best qualified (highest scoring) two or more applicants have the same point accumulation, the tentative selectee will be determined by a tie-breaker mechanism as follows:
- (1) Each applicant's number of attributable existing authorizations (licenses and construction permits, commercial and noncommercial) in the same service (radio or television) nationally, as of the time of application shall be compared, and the applicant with the fewest authorizations will be chosen as tentative selectee;
 - (2) If a tie remains after the tie breaker in Section c(1), the tentative selectee will be the remaining applicant with the fewest pending new and major change applications in the same service at the time of filing;

(3) If a tie remains after the tie breaker in Section c(2), each of the remaining applicants will be identified as a tentative selectee, with the time divided equally among them.

(d) Settlements. At any time during this process, the applicants may advise the Commission that they are negotiating or have reached settlement, and the Commission will withhold further comparative processing for a reasonable period upon such notification. Settlement may include an agreement to share time on the channel voluntarily or other arrangement in compliance with Commission rules. Parties to a settlement shall comply with Section 73.3525, limiting any monetary payment to the applicant's reasonable and prudent expenses.

§ 73.7004 Petitions to Deny Tentative Selectee(s)

- (a) For mutually exclusive applicants subject to the selection procedures in Subpart J, Petitions to Deny will be accepted only against the tentative selectee(s).
- (b) Within thirty (30) days following the issuance of a public notice announcing the tentative selection of an applicant through fair distribution (section 73.7002) or point system (section 73.7003) procedures, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.
- (c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be 10 days from the filing date for petitions to deny, and the time for filing replies shall be 5 days from the filing date for oppositions.
- (d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, the application will be granted. If the Commission determines that the points originally claimed were higher than permitted, but that there is no substantial and material question of fact of applicant qualifications, it will compare the revised point tally of the tentative selectee to the other mutually exclusive applicants and, either grant the original application or announce a new tentative selectee, as appropriate. If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the new tentative selectee.

§ 73.7005 Holding period.

(a) **Assignments/Transfers.** NCE stations awarded by use of the point system in Section 73.7003 shall be subject to a holding period. From the grant of the construction permit and continuing until the facility has achieved four years of on-air operations, an applicant proposing to assign or transfer the construction permit/license to another party will be required to demonstrate (1) that the proposed buyer would qualify for the same number of or greater points as the assignor or transferor originally received; and (2) that consideration received and/or promised does not exceed the assignor's or transferor's legitimate and prudent expenses. For purposes of this section, legitimate and prudent expenses are those expenses reasonably incurred by the assignor or transferor in

obtaining and constructing the station (e.g. expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). Costs incurred in operating the station are not recoverable (e.g. rent, salaries, utilities, music licensing fees, etc.). Any successive applicants proposing to assign or transfer the construction permit/license prior to the end of the aforementioned holding period will be required to make the same demonstrations.

(b) **Technical.** In accordance with the provisions of Section 73.7002, an NCE applicant receiving a decisive preference for fair distribution of service is required to construct and operate technical facilities substantially as proposed, and can not downgrade service to the area on which the preference is based for a period of four years of on-air operations.

(c) The holding period in this section does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

PART 74 - EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTION SERVICES

1. The authority citation for part 74 continues to read:
Authority: 47 U.S.C. 154, 303, 307, and 554.

2. Section 74.1233 is amended by revising paragraphs (b), (c), and (e) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

* * * * *

(b) ***

(3) Applications for reserved band FM translator stations will be processed using filing window procedures. The FCC will specify by Public Notice, a period for filing reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications will be accepted only during these specified periods. Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(4) Timely filed applications for new facilities or for major modifications for reserved band FM Translators will be processed pursuant to the procedures set forth in Subpart K (Section 73.7000 *et seq.*) Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in Section 73.7003; and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of Section 73.7004 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the application, it will be granted. If an application is found not to be acceptable for

filing, the application will be returned, and subject to the amendment requirements of Section 73.3522.

(c) * * *

(1) There is not pending a mutually exclusive application.

* * * * *

(e) * * *

(3) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will apply the same point system identified for full service reserved band FM stations in Section 73.7003(b). In the event of a tie, the FCC will consider:

(i) Each applicant's number of existing FM translator authorizations (licenses and construction permits) of the same type (fill-in or non fill-in as defined in paragraphs 1 and 2 above) as of the time of application shall be compared, and the applicant with the fewest authorizations will be chosen as tentative selectee;

(ii) If a tie remains, after the tie breaker in section (i), the remaining applicant with the fewest pending new and major change applications for FM translators of the same type (fill-in or non fill-in) will be chosen as tentative selectee;

(iii) Where the procedures in paragraphs e(1), e(2) and e(3)(i) and (ii) of this section fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.